

STATE OF MICHIGAN
IN THE SUPREME COURT

RONALD M. NASTAL and IRENE NASTAL, Supreme Court Docket No. 125069

Plaintiffs-Appellees,

Court of Appeals Docket No. 241200

v

Lower Court Case
No. 00-030589-NZ

HENDERSON & ASSOCIATES
INVESTIGATIONS, INC., NATHANIEL
STOVALL and ANDREW CONLEY,

Defendants-Appellants.

BRIEF OF AMICI CURIAE MICHIGAN
COUNCIL OF PRIVATE INVESTIGATORS, MICHIGAN PROFESSIONAL BAIL
AGENTS ASSOCIATION, & COURT OFFICERS AND DEPUTY SHERIFFS,
PROCESS SERVERS OF MICHIGAN

Respectfully submitted,

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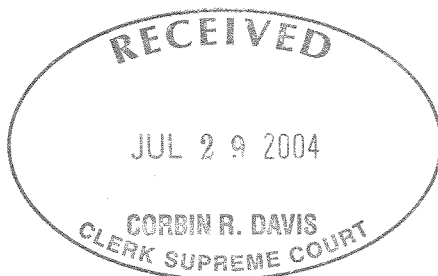


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STATEMENT OF FACTS

The amici rely on the statement of facts submitted by appellants Henderson & Associates, Nathaniel Stovall, and Andrew Conley (“appellants”).

STATEMENT OF APPELLATE JURISDICTION

The amici rely on the statement of appellate jurisdiction submitted by appellants.

STATEMENT OF INTEREST OF *AMICI CURIAE*

This brief represents the perspective of three organizations that share similar interests. The Michigan Council of Private Investigators ("MCPI") is a non-profit Michigan corporation organized in 1983 to serve the private investigation industry in this state. Its goals are to project a positive public image of the industry through honesty, ethics, and integrity, to provide training and education regarding current methods and techniques, and to promote and secure reasonable and fair regulation and legislation that will ultimately benefit the industry, its clients, and the public. In the past, MCPI has provided the Legislature with relevant information regarding pending bills and hearings, and did so during the process leading to the current stalking legislation.

The Michigan Professional Bail Agents Association ("MPBAA") is a non-profit Michigan corporation organized in 1990 to serve the bail agent profession and to promote public understanding of that profession. MPBAA seeks to insure that all bail agents are qualified, well-trained, and familiar with the best procedures and techniques, to improve and reinforce the bail bond system, which is the most cost-effective method for pre-trial release of the accused, and to assist all three branches of government in the orderly administration of justice. In order to complete their duties, bail agents must often perform surveillance and other activities similar to those of private investigators.

The final amicus, Court Officers and Deputy Sheriffs, Process Servers of Michigan ("CODSA"), is a non-profit Michigan corporation organized in 1979 to enhance the profession of serving legal process. CODSA's goals include the establishment of a highly-trained, efficient class of servers who will maintain the integrity of their profession and the maintenance of a reasonable and fair legal environment that will improve the profession and

benefit the public. Like private investigators and bail agents, process servers must often use surveillance and other investigative techniques to accomplish their objectives.

Because the professions represented by the amici all regularly use investigative techniques in the course of their duties, the amici have an interest in any matter that would affect their members' ability to perform investigations. The Court's decision in this case could have a significant effect on this ability, and the amici wish to offer their perspective on the issues to assist the Court in making the best decision possible in light of all the relevant information. As this Court stated in *City of Grand Rapids v Consumers Power Co*, 216 Mich 409, 415; 185 NW 852 (1921):

This Court is always desirous of having all the light it may have on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief as amicus curiae, but on such leave being granted it is not the practice to permit the amicus curiae to argue the case or to go further than to file his brief.

In this case, our Court of Appeals determined that the mere presence of a private investigator in the subject's sight once surveillance has been compromised could lead to civil liability, regardless of whether the investigator directed any conduct toward the subject. The Court also held that whether the investigation served a legitimate purpose under these circumstances was a question of fact. The amici submit that this is not only inconsistent with MCL 750.411h, the stalking statute, it is an illogical and arbitrary ruling that could have serious implications for private investigators, bail agents, process servers, and any other profession that involves investigation or surveillance.

A civil stalking suit is a serious matter. MCL 600.2594(1) allows a plaintiff to seek exemplary damages, costs, and attorney's fees as well as standard damages. If an

investigator¹ has no means of challenging frivolous stalking claims as a matter of law, it will exponentially increase the costs of defending against such a claim. Accordingly, the investigator's operating costs, including the cost of obtaining insurance, will rise, and the costs of obtaining investigation services will rise as well. The inflation of these costs would be detrimental to the amici's industries, their clients, and the public. These are the precise interests the amici were organized to protect.

Importantly, the amici do not ask this Court to make a decision based on public policy, and understand that it is this Court's duty to enforce statutes as written. In fact, the amici ask this Court to defer to the Legislature's resolution of this matter, as evidenced by the unambiguous language of MCL 750.411h. The Court of Appeals declined to enforce § 411h as written, and this Court should correct that mistake.

For these reasons, the amici submit that they have the requisite interest in the issues presently before this Court to justify allowing it to express the views which now follow.

¹ For purposes of this brief, "investigator" means not only a private investigator" but also any bail agent or process server engaged in investigation of a subject.

ARGUMENT

Introduction

The Court of Appeals ruled that once appellants' investigation had been compromised, "a question of fact arose with respect to whether their continued appearance in [the victim's] sight were unconsented contacts for purposes of the civil stalking claim." But "unconsented contact" as defined by MCL 750.411h(1)(e) is never enough to support a stalking claim in and of itself because "unconsented contact" may be entirely innocent conduct. In order to constitute "stalking," unconsented contact must rise to the level of "harassment."

MCL 750.411h(1)(c) defines "harassment" as "*conduct directed toward a victim* that includes, but is not limited to . . . unconsented contact" (Emphasis added). It was therefore improper for the Court of Appeals to find that "continued appearance in [the victim's] sight" might constitute "stalking" without evidence of *conduct directed toward the victim*. As a result, the amici ask this Court to reverse the Court of Appeals decision and, if needed, remand this case for a determination of whether appellants committed "conduct directed toward the victim" that may constitute "harassment" and support appellee's civil stalking claim.

- I. **IN ORDER TO SUPPORT A STALKING CLAIM, MCL 750.411h(1)(c) REQUIRES SOME "CONDUCT DIRECTED TOWARD A VICTIM." THE COURT OF APPEALS ERRED TO THE EXTENT IT CONCLUDED THAT "CONTINUED APPEARANCE IN THE VICTIM'S SIGHT" CREATED A QUESTION OF FACT REGARDING "STALKING" WITHOUT REQUIRING THAT THE "APPEARANCE" BE "DIRECTED TOWARD A VICTIM."**

The Court of Appeals failed to enforce MCL 750.411h as written and require that Mr. Nastal present evidence of "conduct directed toward a victim." The amici agree that

affirmative conduct by a private investigator after being discovered, such as confronting or shouting at the subject, might constitute “harassment,” and therefore “stalking,” because it would be conduct directed toward the victim. But “continued appearance in [the victim’s] sight,” without more, is insufficient, and the Court of Appeals decision holding otherwise is erroneous.

A. Standard of Review.

This matters turns on the proper interpretation of MCL 750.411h. In *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220, 224; 666 NW2d 299 (2003), our Supreme Court prescribed the method of analysis for interpreting statutes:

In interpreting a statute, our obligation is to discern the legislative intent that may reasonably be inferred from the words actually used in the statute. *White v Ann Arbor*, 406 Mich 554, 562; 281 NW2d 283 (1979). A bedrock principle of statutory construction is that “a clear and unambiguous statute leaves no room for judicial construction or interpretation.” *Coleman v Gurwin*, 443 Mich 59, 65; 503 NW2d 435 (1993). When the statutory language is unambiguous, the proper role of the judiciary is to simply apply the terms of the statute to the facts of a particular case. *Turner v Auto Club Ins Ass’n*, 448 Mich 22, 27; 528 NW2d 681 (1995). In addition, words used by the Legislature must be given their common, ordinary meaning. MCL 8.3a.

In addition, a court may consult dictionary definitions to determine the common, ordinary meaning of terms. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

B. The Court of Appeals failed to enforce MCL 750.411h as written when it concluded that “appearance in the sight” of the victim could constitute “stalking” but failed to require evidence of “conduct directed toward the victim.”

The Court of Appeals focused on whether appellants’ acts or omissions constituted “unconsented contact” under MCL 750.411h(1)(e). But the threshold question should have

been whether appellants' acts or omissions constituted "harassment" under MCL 750.411h(1)(c) because "unconsented contact" that does not rise to the level of "harassment" fails to constitute "stalking." The Court's error arises from its inversion of the statutory analysis.

1. The stalking statutes.

MCL 600.2954 creates a civil action for "stalking" but does not define the term. Instead, it references MCL 750.411h, or § 411h of the Michigan Penal Code, which defines "stalking," and MCL 750.411i, which defines "aggravated stalking." Only § 411h is at issue here. In pertinent part, § 411h provides:

(1) As used in this section:

(a) "Course of conduct" means a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose.

(b) "Emotional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

(c) **"Harassment" means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact** that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.

(d) **"Stalking" means a willful course of conduct involving repeated or continuing harassment of another individual** that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(e) **"Unconsented contact" means any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be**

avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following:

- (i) Following or appearing within the sight of that individual.
- (ii) Approaching or confronting that individual in a public place or on private property.
- (iii) Appearing at that individual's workplace or residence.
- (iv) Entering onto or remaining on property owned, leased, or occupied by that individual.
- (v) Contacting that individual by telephone.
- (vi) Sending mail or electronic communications to that individual.
- (vii) Placing an object on, or delivering an object to, property owned, leased, or occupied by that individual.

(f) "Victim" means an individual who is the target of a willful course of conduct involving repeated or continuing harassment. [Emphasis added]

2. There can be no "stalking" without "harassment," and there can be no "harassment" without "conduct directed toward the victim."

The definition of "stalking" is the focal point of § 411h because it is the conduct that creates the possibilities of criminal penalty and civil liability. Therefore, it is also the starting point for the proper analysis. Section 411h(1)(d) defines "stalking" as "a willful course of conduct involving repeated or continuing harassment of another individual"

While "willful" in this context probably does not mean that the defendant must intend to frighten or terrorize the victim,² there can be no dispute that it requires intentional action.³

² Although there is no Michigan case so holding, § 411h appears to require only a general intent, or an intent to do the acts that make up of the harassing course of conduct regardless of whether the actor intends the to terrorize or frighten the victim. The term "willful" is not dispositive because it is "a word of many meanings" *People v Nowack*, 462 Mich 392, 407; 614 NW2d 78 (2000), quoting Perkins, *Criminal Law* (2d ed), § 2, pp 217-218. "Willful" or "willfully" can simply mean an intent to do the act itself in some instances, and mean "a bad purpose or evil intent" in others. Perkins & Boyce, *Criminal Law* (3d ed), § 4, pp 875-876. Therefore, the required intent for stalking must be gleaned from § 411h(1)(d) as a whole.

Because § 411h(1)(d) contains an objective, reasonable person element, it follows that stalking is probably a general intent crime. It would seem unworkable to require a

subjective intent to cause a reasonable person terror or fright. On the other hand, our Court of Appeals seemed to simultaneously suggest specific and general intent components in *People v White*, 212 Mich App 298, 312; 536 NW2d 876 (1995), by stating that “the stalking statutes specifically prohibit defendant's unconsented contact with his victim **that was aimed at threatening, intimidating, harassing, and frightening** [the victim] **regardless of his alleged romantic inclinations.**” (Emphasis added). This statement does little to shed light on the proper interpretation of § 411h's intent requirement. Also, the *White* Court compared § 411h to a Florida stalking statute that requires *willful and malicious* conduct. *Id.* at 310-311; *Pallas v Florida*, 636 So 2d 1358, 1360 (Fla App, 1994). As a result, the *White* Court's position on § 411h's intent requirement is ultimately unclear.

If § 411h(1)(d) does require only general intent, § 411h(1)(c)'s “directed toward a victim” requirement is an important aspect of preventing the stalking laws from applying to “entirely innocent conduct.” *White, supra*, 212 Mich at 312. Without that requirement, acts with no relation to a victim whatsoever or for reasons wholly unrelated to the victim, such as repeated appearances near the victim or the victim's workplace, could create potential liability for stalking. And as the Court of Appeals decision in this case indicates, lower courts will often find that the reasonableness of the victim's reaction is a question of fact, subjecting what might otherwise be meritless claims to trial.

³ Accord *Highway C'mmrs v Ely*, 54 Mich 173, 180; 19 NW 940 (1884):

The word “willfully,” when used to denote the intent with which an act is done, is a word which is susceptible of different significations, depending upon the context in which it is used. It is employed in penal statutes more frequently to distinguish between those acts which are intentional and by design and those which are thoughtless or accidental. It may sometimes mean corruptly or unlawfully, or again designedly or purposely, with an intent to do some act in violation of the law. [Citations omitted.] Sometimes it is used as implying an evil intent without justifiable excuse. [Citations omitted.]

See, e.g., *Nunn v Drieborg*, 235 Mich 383, 386-87, 209 NW 89 (1926):

Wilful means intentional. But by this it is not meant that, in order that the act be intentional or wilful, the defendant must have deliberately willed to drive over the decedent. It is seldom that the failure to exercise reasonable care for the safety of others is intentional. If it is intentional it is not negligence. “When wilfulness comes in at the door, negligence goes out through the window.”

Compare *Ernst v Grand Rapids Engraving Co*, 173 Mich 254, 256; 138 NW 1050 (1912) (“‘Wilful’ means intentional and wrongful. A wilful disobedience must be an intentional

So “stalking” *must* involve intentional actions that constitute “repeated or continuing harassment.”

There is no “including but not limited to . . .” language in § 411h(1)(d), so there can be no stalking without intentional acts that constitute “harassment.” Importantly, § 411h(1)(d) does not mention “unconsented contact,” and unconsented contact alone therefore fails to constitute “stalking.” Because “stalking” requires “harassment,” determining the meaning of “harassment” must be the next step.

Section 411h(1)(c) defines “harassment” as “conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress” The root of this definition is “conduct directed toward a victim.” Although these are common words, it is helpful to define them.

Webster’s Deluxe Unabridged Dictionary (2d Ed, 1983), p 380, defines “conduct” as “4. personal behavior; deportment; way that one acts.” Accord American Heritage Dictionary of the English Language (1981), p 278: “1. The way a person acts; behavior.” Webster’s, p 516, also defines “direct” as “to move, turn, or point (a person or a thing) toward a place, object, or goal; aim; head.” Accord American Heritage Dictionary, p 372: “5. To address to a destination.” “Toward” means “4. concerning; regarding; about; as, his attitude *toward* me,” Webster’s, p 1930, or “4. With regard to; in relation to.” American Heritage Dictionary, p 1358.

disobedience. It is something more than a conscious failure to obey. It involves a wrongful and perverse disposition, such as to render his conduct unreasonable and inconsistent with proper subordination.”)

Compiling these definitions, “conduct directed toward a victim” means *behavior regarding the victim that is addressed to or aimed at the victim*. It is clear that this behavior must be designed to affect the victim. Any other interpretation would render the “toward a victim” clause nugatory.

Section 411h(1)(f) reinforces the “directed toward a victim” requirement by its definition of “victim” as “an individual *who is the target* of a willful course of conduct involving repeated or continuing harassment.” (Emphasis added). The term “target” implies that the conduct is intended to affect the victim. American Heritage Dictionary, p 1316, defines “target” as “3. a. An object of criticism or attack.” Accord Webster’s, p 1866: “5. one who . . . is a marked object of a verbal attack, ridicule, criticism, etc.” In order for the victim to be the “target” of the conduct, it follows that the conduct must be “directed at” the victim.

3. The broad definition of “unconsented contact” may include conduct that fails to constitute “harassment.”

Because “stalking” requires “harassment” but does not require “unconsented contact,” it follows that “unconsented contact” which does not rise to the level of “harassment” is insufficient to constitute “stalking” under § 411h(1)(d). If some form of “unconsented contact” is not “conduct directed toward a victim,” then it is not harassment and cannot create liability for “stalking.”

Some “unconsented contact” may unavoidably be “conduct directed toward the victim.” Section 411h(1)(e) defines “unconsented contact” as “any contact with another individual that is initiated or continued without that individual’s consent or in disregard of that individual’s expressed desire that the contact be avoided or discontinued.” Any physical or verbal contact would most likely be “directed toward a victim,” but the definition includes

some instances where any “contact” would be only visual. “Following or appearing within the sight of that individual” and “[a]ppearing at that individual's workplace or residence” apparently only require that the victim see the defendant in order to constitute “unconsented contact.”

Standing alone, “following or appearing within the sight” of the victim is incredibly broad, and § 411h(1)(e) does not modify or narrow this category of “unconsented contact.” As noted, however, “unconsented contact” alone is not enough to constitute “stalking.” Only “unconsented contact” that is *directed toward the victim* can constitute “harassment,” and so only conduct *directed toward the victim* can ultimately constitute stalking.

- 4. The Court of Appeals erred when it failed to recognize that “unconsented contact” cannot constitute “harassment,” and consequently cannot constitute “stalking,” unless there is evidence of “conduct directed toward a victim.”**

The Court of Appeals read the “conduct directed toward a victim” requirement out of § 411h. Without the “directed toward” the victim component, accidental stalking is possible, which our Court of Appeals previously indicated could not occur under § 411h in *People v White*, 212 Mich App 298, 311; 536 NW2d 876 (1995) (“ . . . the statute could not be applied to entirely innocent conduct . . .”).

But as the Court’s decision in this case proves, the definition of “unconsented contact” is broad and may include “entirely innocent conduct.” Repeated appearance within the sight of a victim without the victim’s consent could constitute “unconsented contact,” regardless of whether the defendant knew the victim or even knew that he had appeared within the victim’s sight.

Accordingly, our Legislature required something more than just “unconsented contact” to constitute “stalking”; it required that some conduct be directed toward the victim and codified that requirement in § 411h(1)(c), which defines “harassment.” This requirement precludes § 411h from applying to “entirely innocent conduct.” But in order to be effective, § 411h(1)(c) must be enforced as written, and the Court of Appeals failed to do so here.⁴

In sum, under § 411h “stalking” is “a willful course of conduct involving repeated or continuing harassment of another individual” “Harassment” is “conduct directed toward a victim” that may or may not include “unconsented contact.” And a “victim” must be a “target” of the “course of conduct” at issue. So the Court of Appeals’ objective in this case should have been to determine if Mr. Nastal presented sufficient evidence to create a

⁴ Even the model Criminal Jury Instruction ignores § 411h(1)(c) and indicates that “unconsented contact” is enough. CJI2d 17.25 reads:

(1) [The defendant is charged with / You may consider the lesser offense of] stalking. To establish this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) **First, that the defendant committed two or more willful, separate, and noncontinuous acts of unconsented contact** with [name complainant].

(3) Second, that the contact would cause a reasonable individual to suffer emotional distress.

(4) Third, that the contact caused [name complainant] to suffer emotional distress.

(5) Fourth, that the contact would cause a reasonable individual to feel [terrorized / frightened / intimidated / threatened / harassed / molested].

(6) Fifth, that the contact caused [name complainant] to feel [terrorized / frightened / intimidated / threatened / harassed / molested] [Emphasis added.]

The instruction clearly deviates from the language of § 411h. Not only would it allow the jury to conclude that “stalking” occurred without “harassment,” it indicates that “stalking” cannot occur without “unconsented contact,” which is contrary to § 411h(1)(d). This Court held that a model jury instruction for common-law arson was improper in *People v Nowack*, 462 Mich 392; 614 NW2d 78 (2000), and it should do so again in this case.

question of fact regarding whether appellants engaged in a willful course of conduct involving repeated or continuing behavior directed toward Mr. Nastal.

5. **Continued appearance in the victim's sight does not imply conduct directed toward the victim, and the Court of Appeals erred to the extent it held that such continued appearance, without more, could create a question of fact regarding Mr. Nastal's civil stalking claim.**

Instead of applying §411h as written, the Court of Appeals focused on "unconsented contact," apparently assuming that evidence of "unconsented contact" was enough to create a question of fact regarding Mr. Nastal's stalking claim:

Subsection 411h(1)(e)(i) provides that an unconsented contact occurs when the stalker initiates or continues a contact with an individual without the individual's consent by "following or appearing within the sight of that individual." After the first surveillance was thwarted when plaintiff made it clear that he did not consent to being followed by Conley, Conley nonetheless continued to appear within plaintiff's sight until the police arrived. Once plaintiff detected Conley and Stovall in the second and fourth surveillances, a question of fact arose with respect to whether their continued appearance in his sight were unconsented contacts for purposes of the civil stalking claim.

* * *

. . . Given the above, we conclude that the trial court correctly ruled that a genuine issue of material fact existed as to the legitimate purpose of the surveillance after the investigators were detected in the second and fourth surveillances. [Exhibit A, p 5.]

The amici agree with appellants' assertion that an investigation does not automatically lose its legitimate purpose once surveillance is compromised. But even if the Court correctly determined that a question of fact existed regarding appellants' legitimate purpose, there is still the question of how "continued appearance in [the victim's] sight," without evidence of conduct directed toward the victim, can constitute stalking.

It is undisputed that appellants' investigation served a legitimate purpose until surveillance was compromised. So any conduct constituting "stalking" must have occurred after that point. If appellants' only "conduct" after that point was failure to immediately leave the scene, then there is no evidence of "conduct directed toward the victim" and no question of fact regarding stalking.

Importantly, the Court of Appeals did not suggest that appellants did anything other than fail to immediately leave. There is no suggestion that appellants placed themselves in a conspicuous position so that Mr. Nastal would see them. There is no suggestion that appellants glared at Mr. Nastal or attempted to intimidate him. Any of these actions may have arguably been "directed toward the victim," but merely failing to leave is directed toward no one at all.⁵

In light of §411h(1)(d)'s requirement that "stalking" constitute intentional "conduct directed toward a victim," the Court of Appeals incorrectly concluded that "continued appearance in [Mr. Nastal's] sight" was enough evidence to create a question of fact regarding Mr. Nastal's stalking claim. Under the plain language of § 411h(1)(c), the Court should have required proof that appellants' behavior was somehow directed toward Mr. Nastal – that he was a "target" of conduct in violation of the statute. In the absence of such

⁵ The amici do not advocate that investigators should be immune from stalking liability under all circumstances and understand that there may be occasions when the investigation loses its legitimate purpose. For example, some investigations may have an ulterior, unauthorized purpose, such as to harass or abuse the subject. In these instances, the investigator would be directing conduct toward the victim, the conduct would have no legitimate purpose, and the investigator's actions could arguably constitute harassment under MCL 750.411h(1)(c). See Section II, below, for the amici's perspective on the legitimate purpose of an investigation.

proof, the Court of Appeals erred when it ruled that a question of fact existed in this case. The amici cannot unequivocally state that such proof did not exist in this case. As a result, a remand to the Court of Appeals may be necessary to allow for a determination of Mr. Nastal's proofs under the correct legal standard.

II. IN THE ABSENCE OF A CLEAR LEGISLATIVE DEFINITION OF "LEGITIMATE PURPOSE," THIS COURT SHOULD HOLD THAT AN INVESTIGATION SERVES A LEGITIMATE PURPOSE WHENEVER THE INVESTIGATOR IS PERFORMING AN ACTIVITY AUTHORIZED BY STATUTE, REGARDLESS OF WHETHER THE INVESTIGATION HAS BEEN COMPROMISED.

Beyond its failure to apply MCL 750.411h as written, the Court of Appeals also erred in failing to clearly define when an investigation serves a legitimate purpose. Section 411h does not define "legitimate purpose," but the Court of Appeals' conclusion that an investigation may lose its legitimate purpose merely because the subject discovers the investigation is both illogical and problematic. In contrast, the amici submit that an investigation serves a legitimate purpose for purposes of § 411h(1)(c) as long as the investigators are authorized by statute to carry it out.

A. An investigation serves a "legitimate purpose" under § 411h(1)(c) if the Legislature has authorized that purpose.

Our Legislature has explicitly authorized the normal business activities of private investigators, bail agents, and process servers. In other words, these activities are legitimate in Michigan, and there can be no liability under MCL 600.2594 or § 411h for an investigator's actions that serve a legitimate purpose. The amici will briefly outline the statutory authority for their respective professions below.

The state may issue a license to qualified applicants to do business as private investigators pursuant to MCL 338.825. MCL 383.822(b) defines the scope of a private investigator's powers:

"Private detective" or "private investigator" means a person, other than an insurance adjuster who is on salary and employed by an insurance company or other than a professional engineer, who, for a fee, reward, or other consideration, engages in business or accepts employment to furnish, or subcontracts or agrees to make, or makes an investigation for the purpose of obtaining information with reference to any of the following:

(i) Crimes or wrongs done or threatened against the United States or a state or territory of the United States.

(ii) The identity, habits, conduct, business, occupation, honesty, integrity, credibility, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of a person.

(iii) The location, disposition, or recovery of lost or stolen property.

(iv) The cause or responsibility for fires, libels, losses, accidents, or damage or injury to persons or property.

(v) Securing evidence to be used before a court, board, officer, or investigating committee.

So a private investigator is licensed to "obtain information" for any of the purposes MCL 383.822(b) describes. It follows that as long as the investigator is "obtaining information" for an enumerated reason, the investigation serves a legitimate purpose and cannot constitute "stalking" under § 411h(1)(c).

Similarly, MCL 765.26(1) authorizes a bail agent to arrest the accused:

(1) In all criminal cases where a person has entered into any recognizance for the personal appearance of another and such bail and surety afterwards desires to be relieved from responsibility, he or she may, with or without assistance, arrest or detain the accused and deliver him or her to any jail or to the sheriff of any county. In making the arrest or detainment, he or she is entitled to the assistance of any peace officer.

It follows that a bail agent's efforts to arrest or detain an accused serve a legitimate purpose, and those efforts necessarily include finding the accused. A bail agent's investigation of the accused's whereabouts therefore cannot constitute "stalking."

MCL 600.8321 authorizes sheriffs, deputies, and court officers to serve civil process in district court actions. MCL 600.584 authorizes sheriffs, deputies, coroners, and constables to serve civil process in circuit court actions, and MCL 600.585 allows the serving officer to "take the power of the county" if she believes that she will encounter resistance. Like a bail agent's efforts to arrest an accused, a process server's efforts to serve process require her to find the defendant, and those efforts explicitly serve a legitimate purpose.

So the normal business activities of private investigators, bail agents, and process servers are all explicitly authorized or permitted by statute, and must therefore serve a legitimate purpose. Importantly, these legitimate purposes do not disappear merely because surveillance is compromised. The private investigator may still "obtain information," the bail agent may still arrest or detain the accused, and the process server may still attempt to serve the defendant. The fact that the subject is aware of the investigator in any of these instances is utterly irrelevant to the purpose of the efforts.

B. Contrary to the Court of Appeals' decision, the subject's awareness of the investigation has no effect on its purpose.

As a result, the Court of Appeals' arbitrary determination that the subject's awareness marked a point after which further investigation might be "illegitimate" is simply wrong. It fails to recognize the purpose of the investigation at issue; in this case, to "obtain information." MCL 383.822(b) specifically permits a private investigator to do this, and it was still possible after Mr. Nastal discovered the surveillance.

Drawing such an arbitrary line also has the potential to cripple the investigation industry. If the Court of Appeals decision stands, investigators could be subject potential stalking liability each time they continue to observe a subject after the subject discovers the surveillance. Because legitimacy would be a question of fact under these circumstances according to the Court of Appeals, investigators would be subject to the full expenses of a trial no matter how frivolous the claim might otherwise be. MCL 600.2594(1) also allows the plaintiff to seek exemplary damages and attorney's fees, driving the costs of defending such suits beyond that of normal actions. If there is no legal defense to these claims, it may deal a damaging blow to all investigators in this state.

As a practical matter, surveillance is often still valuable and desirable after the subject discovers the investigator's presence. For example, if the investigation's purpose is to test the validity of the subject's claimed leg injury, it is important to determine if the subject walked differently, or ceased walking altogether, after he discovered the surveillance. In the same case, if the subject drove to a soccer field and played in a game after discovering the surveillance, it makes no sense to conclude that observing these actions might not be legitimate simply because the subject was aware of the investigation.

The value of continuing surveillance after the subject is aware of the efforts is not restricted to insurance claims. For instance, if an employer hires a private investigator to monitor a disgruntled employee who has displayed warning signs for workplace violence, the employees' behavior does not lose its relevance once she is aware of the investigator's presence. In fact, if the investigator has observed dangerous behavior, it may be improper to end surveillance simply because of the employee's awareness.

The amici therefore submit that this Court should conclude that private investigators, and by implication bail agents, process servers, and any other professional whose normal conduct is explicitly authorized by statute, are exempt from stalking liability *as long as their conduct is serving an authorized purpose*. Specifically, a private investigation serves a “legitimate purpose” for purposes of MCL 750.411h(1)(c) as long the investigator is observing the subject to “obtain information.” If the investigator is engaged in his normal authorized activities, it makes little sense to hold that those activities may no longer be legitimate simply because the subject is aware of them. So unless a plaintiff produces proof that the investigation has an ulterior, unauthorized purpose, such as to harass or abuse the subject, a stalking claim based on the normal surveillance activities of an investigator must fail, regardless of whether the subject is aware of those activities.⁶

⁶As stated above, the amici do not assert that § 411h would *never* apply to an investigator’s conduct. If a plaintiff offers actual proof that an investigation is intended only to harass or abuse the subject, § 411h may apply. But when the Legislature has explicitly authorized a private investigator to “obtain information,” the investigator’s surveillance activities cannot constitute stalking simply because they continued after the subject was aware of them.

CONCLUSION AND RELIEF REQUESTED

Amici curiae Michigan Council of Private Investigators, Michigan Professional Bail Agents Association, and Court Officers and Deputy Sheriffs, Process Servers of Michigan ask this Court to ensure that lower courts will enforce MCL 750.411h as written. By their plain terms, the stalking statutes provide for liability only when the defendant commits "conduct directed toward a victim." In this case, the Court of Appeals overlooked this language, and that mistake could have serious consequences if this Court does not rectify it. Also, to the extent this Court determines whether the meaning of "legitimate purpose" under MCL 750.411h(1)(c), the amici submit that an investigation serves a legitimate purpose as long as that purpose is authorized by statute.

Respectfully submitted,

WILLINGHAM & COTÉ, P.C.

Dated: July 28, 2004

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STATE OF MICHIGAN
COURT OF APPEALS

RONALD M. NASTAL and IRENE NASTAL,

Plaintiffs-Appellees,

v

HENDERSON & ASSOCIATES
INVESTIGATIONS, INC., NATHANIEL
STOVALL and ANDREW CONLEY,

Defendants-Appellants.

UNPUBLISHED
October 30, 2003

No. 241200
Wayne Circuit Court
LC No. 00-030589-NZ

Before: Cavanagh, P.J., and White and Talbot, JJ.

PER CURIAM.

Plaintiff Ronald Nastal,¹ brought this action against defendants, claiming that they negligently conducted an insurance investigation on him and stalked him. Defendants appeal by leave granted from an order of the circuit court granting in part and denying in part their motion for summary disposition. We affirm in part and reverse in part.

I. Facts

In 1997, plaintiff suffered a minor concussion when a semi-tractor trailer ran through a red or yellow light and struck plaintiff's car. In the weeks following the accident, plaintiff began to complain of headaches, blurred vision, unsteady gait, forgetfulness, depression and mood changes. One of plaintiff's physicians reported that plaintiff suffered a closed-head injury. Plaintiff was placed on temporary disability from his job.

In 1998, plaintiff filed a third-party claim against the driver of the semi-tractor trailer. The driver's insurer, Citizens Insurance Company of America ("Citizens"), assumed the defense. The case was mediated for \$450,000. Citizens considered that amount to be excessive, particularly in light of two medical evaluations performed respectively by the independent medical examiners of Citizens and plaintiff's employer. The first was a neuropsychological

¹ Plaintiff Irene Nastal's claim in this case is for loss of consortium. This opinion refers to Ronald Nastal as "plaintiff."

evaluation that concluded plaintiff may not be suffering from a closed-head injury or any residual effects from the accident but from a personality disorder called "somatoform disorder." The second was a neurosurgery evaluation that concluded plaintiff was fit to return to work but recommended a psychiatric evaluation. Accordingly, Citizens referred plaintiff to Dr. Leon Quinn, a psychiatrist, for an independent psychiatric examination. Citizens also hired Henderson & Associates Investigations, Inc. ("Henderson"), to perform credit report background and activities checks and to conduct a surveillance on plaintiff.

Henderson performed the first surveillance on the morning of June 30, 1999. Plaintiff left his house at 7:08 a.m. Henderson's investigator, defendant Andrew Conley, followed plaintiff's car. About forty-five minutes later, Conley suspected that plaintiff may have spotted him because plaintiff appeared to be driving in a manner trying to evade Conley's vehicle. Seven minutes later, plaintiff parked his car and entered a medical rehabilitation facility. A few minutes later, plaintiff left the medical facility and walked to Conley's vehicle where he confronted Conley. Plaintiff did not believe Conley when he said that he was not following plaintiff. Plaintiff was belligerent and profusely swore at Conley. Conley rolled up his window and drove away, only to park his vehicle about one hundred to three hundred yards away. He radioed his supervisor Gregory Henderson to inform him that the surveillance had been compromised. Henderson ordered Conley to terminate the surveillance. Conley remained in his car and began filing out paperwork when a police officer approached him and asked whether he was following plaintiff. Conley informed the officer that he was investigating an insurance claim. Plaintiff testified that he did not believe the police office when she later told him that Conley was not following him.

The second surveillance took place on July 6, 1999. Conley was accompanied by a second investigator, defendant Nathaniel Stovall, who was driving a separate vehicle. That morning, Conley followed plaintiff as he drove to a number of places. Plaintiff returned home at 10:52 a.m., where he remained except for taking two walks in the afternoon. The surveillance ended at 4:40 p.m.²

According to a document issued by the police dispatch, the police received a call from plaintiff's address at 10:58 a.m. on July 6, 1999, complaining that the caller believed the "suspects" were following him. A scout car was dispatched at 11:02 that morning. The report indicated a vehicle was involved in investigating an insurance fraud. Conley testified that he was unaware that plaintiff had called the police five minutes after returning home that morning, and he testified that he was unaware that a police unit drove up to Stovall's car and questioned him about his presence there. Stovall testified that he was parked about eight houses away from plaintiff's house that day. He did not remember where Conley was parked. Two or more police

² We note that the documentary evidence before the trial court at the time of summary disposition is inconsistent with Conley's testimony about the time in which plaintiff remained at home on July 6, 1999. According to the independent psychiatric evaluation performed by Dr. Leon Quinn, plaintiff was at Dr. Quinn's office at 12:05 p.m., that day, and the examination continued for 105 minutes. It does not appear from the evidence before the court that this discrepancy was noted or resolved.

units approached Stovall and a police officer questioned him about his presence in the neighborhood, stating that "someone in the neighborhood" had called over a suspicious vehicle. The officer did not tell Stovall that plaintiff had made the call and Stovall believed that the call was made by one of plaintiff's neighbors. Stovall did not specifically ask the officer whether plaintiff had made the call. He did not radio Henderson with the information because such encounters with the police are frequent and he did not know that plaintiff called the police, even though he testified that it "very well could have been" plaintiff.

The third surveillance took place on July 8, 1999. According to the documentary evidence that was before the trial court at the time of summary disposition, this surveillance was uneventful because plaintiff remained at home all day. It does not appear from the record that Conley or Stovall were involved in the third surveillance.

Meanwhile, on the same day, July 8, 1999, Dr. Quinn issued his psychiatric evaluation of plaintiff. Dr. Quinn noted that all of the medical examinations that had been taken on plaintiff since the accident showed no abnormalities. Dr. Quinn opined that plaintiff was experiencing a "depressive illness and there may be more factors contributing to that depression than simply the accident and possible trauma associated with it." He recommended that any investigative surveillance on plaintiff be terminated because of its "potential to provoke additional symptomatology."

Citizens' adjuster Penny Judd testified that Dr. Quinn's independent psychiatric evaluation report was received at Citizens' mailroom on Friday, July 30, 1999. She read the letter the week of Monday, August 2, 1999, a few days after the fourth and final surveillance had occurred. The fourth surveillance took place on Saturday, July 31, 1999. Both Conley and Stovall followed plaintiff from his home in separate cars. At 11:58 a.m., plaintiff arrived at Wonderland Mall in Livonia. Conley's written report indicates that, at 12:09 p.m., plaintiff was driving behind Conley's car. Conley believed that plaintiff was trying to take down the plate number of Conley's car. At some point, plaintiff stopped behind Conley's car. Plaintiff then turned in tight circles and tried to get behind Stovall's car. Conley radioed his supervisor, Gregory Henderson, who instructed him to continue the surveillance until plaintiff reached his next point of destination. Conley's written report indicates that plaintiff left the parking lot at 12:16 p.m., and performed "maneuvers at Ford and Central" at 12:27 p.m. The surveillance was terminated at Ford and Newburgh roads at 12:41 p.m.

Judd and Gregory Henderson communicated on August 4, 1999. Based on Dr. Quinn's recommendation to cease the investigation and Gregory Henderson's information that that plaintiff spotted the investigators during the Saturday, July 31, 1999, surveillance, Judd ended Henderson's investigation of plaintiff.

II. Procedural History

Plaintiff filed the instant lawsuit against Citizens, Henderson and "John Does," alleging defamation, intentional infliction of emotional distress, negligence and stalking. After discovery was complete, the trial court entered an order replacing "John Does" with the names of Conley and Stovall. Citizens and defendants filed separate motions for summary disposition. The trial court granted summary disposition on all claims except the claim of negligence against Citizens, and the claims of stalking and negligence against defendants. Plaintiff subsequently settled with

Citizens and an order was entered dismissing Citizens from the case. This Court granted defendants leave to appeal.

III. Standard of Review

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). Although the trial court did not state the particular subrule under which it decided the summary disposition motion, it is clear that the court relied on proofs outside the pleadings in reaching its decision. Accordingly, the issues on this appeal will be reviewed under MCR 2.116(C)(10). *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 633 n 4; 601 NW2d 160 (1999). We review a trial court's decision to grant a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion granted under MCR 2.116(C)(10), this Court must examine all relevant documentary evidence in the light most favorable to the nonmoving party and determine whether there exists a genuine issue of material fact on which reasonable minds could differ. *Progressive Timberlands, Inc v R & R Heavy Haulers, Inc*, 243 Mich App 404, 407; 622 NW2d 533 (2000). The nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

II. Analysis

A. Stalking

Defendants argue that the trial court improperly ruled that the elements of stalking were met in this case. We disagree.

The civil stalking statute, MCL 600.2954, creates a civil cause of action for victims of stalking as defined by the criminal stalking statute, MCL 750.411h, regardless whether the alleged stalker is charged or convicted under the equivalent criminal stalking statute. According to MCL 750.411h(1)(d), "stalking" is the "wilful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."

The term "harassment" as used in subsection 411h(1)(d) is defined as:

... conduct directed toward a victim that includes, but is not limited to, repeated or continued unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose. [MCL 750.411h(1)(c).]

Defendants argue that the surveillance activities did not rise to the level of harassment as defined by subsection 411h(1)(c). Defendants first assert that there was no genuine issue of material fact in this case because the surveillance served a legitimate purpose. We disagree. Defendants fail to address on appeal the fact that the trial court determined that the surveillance initially served a legitimate purpose but that a genuine issue of material fact as to its legitimacy

arose when the second and fourth surveillance activities continued after plaintiff discovered that he was followed. Defendants Conley and Stovall and their supervisor, Gregory Henderson, all testified that once the subject of the surveillance discovered that he was being followed, the surveillance activity served no purpose and should be discontinued. We conclude that the court did not err in this ruling.

Defendants next argue that plaintiff failed to meet the “reasonable person” standard as used in subsection 411h(1)(c) and (d) because plaintiff was suffering from a closed head injury and had apparent emotional problems that rendered him unreasonable in any feeling of being harassed. As this Court has held, “generally, once a standard of conduct is established, the reasonableness of an actor’s conduct under the standard is a question for the factfinder, not the court.” *Jackson v Saginaw Co*, 458 Mich 141, 146; 580 NW2d 870 (1998), quoting *Tallman v Markstrom*, 180 Mich App 141, 144; 446 NW2d 618 (1989). However, if, on the basis of the evidence presented, reasonable minds could not differ, then the motion for summary disposition should be granted. *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992). Under the circumstances and facts of this case, we conclude that the question whether plaintiff’s feelings of being harassed were reasonable was one for the factfinder, not the trial court.

Defendants’ next argument is unclear. It appears defendants argue that plaintiff failed to meet the “emotional distress” and the “unconsented contact” standards as set forth in subsection 411h(1)(c). However, defendants analyze this argument within the context of plaintiff’s separate claim of intentional infliction of emotional distress that was dismissed by the trial court on summary disposition and is not part of this appeal. Because that claim is not before us, we address defendant’s argument under the context of the civil stalking statute.

Specifically, defendants assert that plaintiff fails to meet the “emotional distress” and “unconsented contact” standards because it was he who initiated contact with Conley. We disagree. Subsection 411h(1)(e)(i) provides that an unconsented contact occurs when the stalker initiates or continues a contact with an individual without the individual’s consent by “[f]ollowing or appearing within the sight of that individual.” After the first surveillance was thwarted when plaintiff made it clear that he did not consent to being followed by Conley, Conley nonetheless continued to appear within plaintiff’s sight until the police arrived. Once plaintiff detected Conley and Stovall in the second and fourth surveillances, a question of fact arose with respect to whether their continued appearance in his sight were unconsented contacts for purposes of the civil stalking claim. Further, defendants present nothing to this Court to establish that the element of “emotional distress” could not be met because plaintiff confronted Conley in the first surveillance or attempted to take down the license plate numbers of the vehicles driven by Conley and Stovall in the fourth surveillance.

Defendants next assert that public policy considerations mandate a finding by this Court that the surveillance was a legitimate activity. Defendants specifically argue that a ruling by this Court affirming the trial court’s decision would have “a chilling effect on the private investigation industry throughout the state and a business’ or insurance company’s legitimate right to invest claims.” We disagree.

The facts in this case establish that the surveillance did serve a legitimate purpose. However, as previously mentioned in this opinion, defendant investigators expressly admitted in deposition testimony that once plaintiff detected the investigators, the surveillance served no

purpose. The unique facts in this case did not establish the reasons why the activities of the first, second and fourth surveillances were not discontinued immediately when plaintiff detected the investigators, contrary to Henderson's policies. Given the above, we conclude that the trial court correctly ruled that a genuine issue of material fact existed as to the legitimate purpose of the surveillance after the investigators were detected in the second and fourth surveillances.

B. The Negligence Claim

Defendants argue that the trial court improperly denied summary disposition on the negligence claim. Specifically, defendants assert that they did not owe a legal duty to plaintiff. We agree.

Whether a duty exists to protect a person from a reasonably foreseeable harm is a question of law for the court. *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997). "Duty" is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." *Buczowski v McKay*, 441 Mich 96, 100-101; 490 NW2d 330 (1992) (citation omitted). Whether a plaintiff has stated a valid independent cause of action under the common law, a court must examine "whether the situation is one in which there is a recognized duty at common law, that is, 'whether the actor was under any obligation to exercise reasonable care under the circumstances'" *Madejski v Kotmar Ltd*, 246 Mich App 441, 446; 633 NW2d 429 (2001), quoting *Millross v Plum Hollow Golf Club*, 429 Mich 178, 193; 413 NW2d 17 (1987).

In his complaint, plaintiff failed to allege that defendants owed him a duty. Rather, plaintiff alleged that Citizens negligently hired defendants and that defendants "negligently caused their presence to be known" to him during their surveillance. Plaintiff also claimed that defendants "intentionally cause[d] their presence to be known" to plaintiff. In their motion for summary disposition, defendants argued that no duty existed in this case. In his response to the motion, plaintiff asserted that defendants owed him a common law duty to refrain from harming a fellow human being and that they had "an ordinary duty of care to another." At the hearing for summary disposition, the parties failed to address the question whether a duty existed and the trial court failed to make a ruling on the matter. Nonetheless, it appears that the court may have concluded that a duty existed when it ruled that a question of fact existed as to whether defendants failed to exercise ordinary care.

"A negligence action may only be maintained if a legal duty exists which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Maiden v Rozwood*, 461 Mich 109, 131; 597 NW2d 817 (1999) (citation omitted). "In determining whether to impose a duty, this Court evaluates factors such as: the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." *Murdock, supra* at 53-54. The existence of a duty is essentially a question of whether the relationship between the actor and the injured party gives rise to a legal obligation on the actor's part for the benefit of the injured party. *Moning v Alfano*, 400 Mich 425, 437; 254 NW2d 759 (1977). In this case, we find no authority supporting the existence of such a common law duty and will not search for authority where plaintiff provides none. *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). Further, we decline to address plaintiff's claim that a statutory duty arises under MCL 338.826, which is raised for the first time on appeal.

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Helene N. White

/s/ Michael J. Talbot